

SUPREME COURT OF NOVA SCOTIA

Citation: *Dib v. Ford Motor Company of Canada*, 2019 NSSC 273

Date: 20190912

Docket: Hfx No. 272617

Registry: Halifax

Between:

Peter Dib and George Dib

Plaintiffs

v.

Ford Motor Company of Canada, Limited

Defendant

DECISION

Motion Re: Admissibility of Rebuttal Expert Report

Judge: The Honourable Justice Jamie Campbell

Heard: September 11, 2019, in Halifax, Nova Scotia

Counsel: Barry Mason Q.C., for the Plaintiffs
Ian Dunbar and Robert Mroz, for the Defendant

By the Court:

[1] The trial in this matter is scheduled to start less than two weeks from now, on September 23, 2019. That date was set when the case was adjourned from October 23, 2017.

[2] The concern here is with respect to the timing of the filing of a rebuttal expert's report. The report was filed on July 3, 2019. *Nova Scotia Civil Procedure Rule 55.03(2)* says that a rebuttal expert's report must be filed no more than three months after the expert report is delivered or by a deadline set by a judge. In this case no deadline was set. The issue comes down to what the word "delivered" means.

Summary

[3] The Plaintiffs say that their expert's report was delivered in November 2016, when it was included as an unsigned and undated document in materials provided for a settlement conference. They argue that the Defendant treated the document as having been properly filed and delivered and got adjournments of the trial to file a rebuttal expert's report.

[4] The Plaintiffs did eventually file and deliver a properly signed and dated expert's report on April 10, 2019.

[5] The Rule should be applied. An expert's report is not "delivered" when it is provided informally. If the Plaintiffs' expert's report were considered to have been delivered on November 21, 2016 when the settlement conference materials were sent, the Defendant would have been out of time to file a rebuttal expert's report by February 21, 2017. There was no suggestion by either party that was the case.

[6] The time for filing a rebuttal expert's report does not begin to run until an expert's report has been filed and delivered to the opposing party. The Defendant's rebuttal expert's report was not filed out of time.

Facts

[7] The incident that gave rise to this case happened in February 2004, now more than 15 years ago. Peter Dib was the operator of a 1992 Mercury Grand Marquis vehicle. George Dib was a front seat passenger in the vehicle. Peter Dib was test driving the vehicle with the consent of the owner, Sackville Auto Pro.

Peter Dib says that he parked the vehicle in front of the garage door at Mighty Muffler in Bedford, when the vehicle suddenly accelerated into the garage, hitting the hoist. Peter Dib and George Dib were injured. They say that Ford was negligent in the design and manufacture of the vehicle. They started an action against Ford in October 2006. A significant issue in the trial will be proof of negligence, so that expert opinion will be important.

[8] The vehicle was destroyed before any expert had an opportunity to look at it.

[9] The Plaintiffs were examined at a discovery in 2008 and Ford's witnesses were examined in 2009. It would appear as though not much happened to move the file forward for some years after that.

[10] The Plaintiffs requested a Date Assignment Conference on October 5, 2015. That conference was held on December 18, 2015. Trial dates were set for February 6 through 16, 2017. The finish date was set as November 20, 2016. The Plaintiffs' "Engineer Report" was to be filed by May 30, 2016 and the Defendant's rebuttal expert's report was due by September 30, 2016. A pre-trial conference was set for November 28, 2016 and a Trial Readiness Conference was set for November 23, 2016.

[11] The Plaintiffs retained Samuel Sero to provide an opinion on liability in November 2016. The Plaintiffs obtained a report from Mr. Sero on November 21, 2016. The report was sent to Ford's counsel on that day. It was however an undated, unsigned letter from Mr. Sero's firm to counsel for the Plaintiffs. It was part of a book of exhibits filed for a settlement conference. It was not formally filed with the court at that time. It could not have been because it was neither signed nor dated and was in the form of a letter with no notice attached. But Mr. Sero had sent counsel for the Plaintiffs a dated and signed copy. Counsel does not know why the signed version was not included with the settlement conference brief but says that it was likely due to inadvertence.

[12] Ford requested an adjournment of the settlement conference that had been set for November 28, 2016. The Trial Readiness Conference went ahead before Justice Chipman on November 23, 2016. The parties appear to have agreed that they were not ready for trial. New trial dates were set for October 2017. The finish date was set for August 4, 2017.

[13] The Trial Readiness Conference for the October 2017 trial took place on September 1, 2017. The Defendant indicated that they were not ready to go to trial

because they were waiting for an expert's report. The matter was set for a motion for adjournment. The circumstances that gave rise to that adjournment are relevant here.

[14] Blair Pritchett, as counsel for Ford at the time, noted that since the reassignment of the trial dates Ford had engaged an expert "to rebut the contents of the Plaintiffs' late-filed expert's report however the Plaintiffs have not yet received that report". The motion for an adjournment of the October 2017 trial was granted. Dates were set for September 2019. No finish date as set at that time and no deadlines were set for the filing of documents.

[15] In the brief regarding costs on that motion, an affidavit sworn by Mr. Pritchett on September 19, 2017 was filed. At paragraph 4 of the affidavit Mr. Pritchett says:

After the initial finish date in this matter, in November 2016, I received from counsel for the Plaintiffs an expert report authored by Samuel Sero, which had not previously been disclosed.

[16] Mr. Pritchett goes on to refer to the lateness of the "Plaintiffs' expert report", and notes that through inadvertence of counsel, the Plaintiffs' expert report was not provided to Ford until April 11, 2017. Mr. Pritchett said that Ford retained Thomas Livernois as an expert and believed that Mr. Livernois anticipated providing a report within 6 weeks. That was not an undertaking to provide a report by that time. It was an indication that Ford would be able to accommodate an earlier trial date following the adjournment.

[17] The invoices from Mr. Livernois' firm indicate that by the end of 2017 the bulk of the work had been completed. Both parties contemplated that a rebuttal expert's report would be filed. There was just no date to indicate when. It was not three months from November 21, 2016. That time had long since passed.

[18] Neither of the parties appears to have made inquiries of the other about where the other's report stood. There was no finish date. No dates had been set for the filing of the expert report. Ford had said that a rebuttal report could be prepared within 6 weeks, as of September 19, 2017. That would put it in the range of November 2017. Ford did not contact the Plaintiffs to explain why a report was not being filed, when one was expected based on Mr. Pritchett's statements. And the Plaintiffs did not contact Ford's counsel to ask why no report had been sent.

[19] Laura Veniot is a lawyer representing the Plaintiffs along with Barry Mason Q.C. In her affidavit she acknowledges that the version of Mr. Sero's report sent to Ford with the settlement conference documents on November 21, 2016 was undated and unsigned. She had assumed that the report that she sent had been the signed and dated version which she had in her file. She realized the oversight and filed the signed and dated version on April 10, 2019, along with the Notice of Filing of expert report.

[20] Upon receipt of that Notice and the signed and dated report, Ford operated on the basis that the time began to run. They maintain that they had 3 months in which to file a rebuttal expert's report. The rebuttal report, from Thomas Livernois PhD, was filed with a Notice of Filing of expert's report on July 3, 2019. That is the report to which the Plaintiffs object.

A Series of Misunderstandings

[21] There appears to have been a genuine misunderstanding or a series of misunderstandings. When the Sero report was provided to Ford in November 2016 it was not attached to a Notice of Filing of expert's report. It was unsigned and undated and was included with the without prejudice settlement conference materials. While the Plaintiffs may have considered it to have been delivered, though it had never been filed with the court, one could understand how counsel for the Defendant might then have interpreted the informality as a sign that the document was a draft, filed for purposes of the settlement conference and not for purposes of the trial. One might anticipate that at some point a signed and dated version would be formally filed and delivered for purposes of the trial itself. When an expert report is provided and filed, there is a good reason for it to be attached to a form that makes it clear that this is the report upon which the party will rely at trial. It is not a draft subject to change. It is not going to be withdrawn or amended. It is the document that the opposing party knows is the one to which any response should be directed. Filing in the proper form provides for clarity and certainty.

[22] Sending the document informally is not delivery as contemplated by the Rules. But that gets a bit more complicated and confused given Ford's response to it.

[23] When an adjournment was sought in September 2017, Mr. Pritchett did refer to the Sero report as having been filed, although filed late. That could have led the Plaintiffs then to understand that the non-filed report, included with the settlement

conference materials was considered to have been properly “delivered”. It was not filed. So, at that time it was not “late-filed” because it had not been filed.

[24] The parties were operating on different understandings. The Plaintiffs seem to have believed that the Sero report was properly delivered, even though it had never been filed. And Ford seems to have believed that at some point a report would be formally delivered triggering the time for filing a rebuttal. It seems that neither party wanted to alert the other to a concern.

[25] There was no new finish date set for this trial, and no dates were agreed for the filing of the expert reports. An expert report under Rule 55 would be filed 6 months before the finish date or by a deadline set by a judge. There was no deadline for filing. None was set for the new trial dates.

Conclusion

[26] The best ways to avoid misunderstandings are with straightforward communication and clarity of language.

[27] When parties remain silent with each other, in some kind of prelitigation procedural stand-off, the likelihood of misunderstanding and the motions that flow from misunderstanding increases. There appears to have been no indication in November 2016 that the Sero report was to be considered a final and formal document to which Ford should respond. There was no discussion at the time of the adjournment in October 2017 about filing deadlines for the new trial. There was no discussion through all of 2018 about whether the Sero report was the report on which the Plaintiffs would rely at trial. There was no discussion about why the rebuttal report that had been anticipated had not been received, and no discussion as the trial approached about whether there would be a rebuttal report. In theory, there may be a potential tactical benefit in maintaining silence. Ford would be able to argue that the Sero report should not be admitted if it were never filed and delivered in proper form. The Plaintiffs would be able to argue that any rebuttal expert’s report should not be admitted because it was filed out of time. It is not clear here whether either party has sought to gain advantage in that way. Some straightforward communication may well have avoided this situation.

[28] The Rules provide for formal notice to provide clarity. There should be no room for doubt as to when a report has been filed and delivered. When an expert’s report is formally filed with a Notice of Filing of expert’s report, there is no room for disagreement. The document has been filed, it has been received and it is in its

final form on the date on which it has been filed. There is no requirement for any inferences to be made.

[29] Once the report has been delivered to the other side, they then have 3 months in which to provide a rebuttal report. The time runs from the date the report is delivered which may be later than the date on which it was filed.

[30] Parties have a right to the clarity that comes from compliance with the Rules. No expert report was filed until April 11, 2019, when the Sero report was filed, with a Notice of Filing of expert report. The parties may have had different understandings about the status of the unsigned and undated document included with the settlement conference materials but that does not constitute delivery of an expert report.

[31] The confusion in this case about when the clock starts ticking for filing of a rebuttal report would not have arisen if the Sero report had simply been filed in compliance with the rules. It was not. Ford had it, but at that point it was potentially a draft, subject to changes. When the report was provided, it should have been made clear that it was being filed with the court, at that time, in proper form. The later confusion stems from that.

[32] The Plaintiffs then formally filed the Sero report on April 11, 2019. If the report were properly filed when it was delivered with the settlement conference materials in November 2016, presumably it would not have been necessary to file it again formally in April 2019, 5 months before the trial. The report was filed then, and Ford had 3 months in which to respond. That response came with the rebuttal expert report filed on July 3, 2019.

[33] Once again, this misunderstanding arose from the failure of the Plaintiffs to properly and formally file the Sero report when it was initially given to Ford. With formal filing it is made clear that the report is the final document to which any response will be directed. The formality in the process has a purpose. It avoids the potential for a misunderstanding as to whether a document is the final filed document or not.

[34] The Livernois report was not filed out of time.

[35] If it were file out of time, then it should still be admissible. The circumstances giving rise to the confusion about filing dates is extraordinary. This is not a case in which a party has simply been dilatory. There was genuine

confusion and the confusion starts with the informal filing of the Plaintiffs' expert's report.

[36] The prejudice to the Plaintiffs is that their counsel will have less time to prepare for cross-examination of the rebuttal expert. That would be a very serious concern if the rebuttal expert report had been filed in the days before trial, or perhaps even in the weeks before trial. It has instead been filed more than 2 months before the trial.

[37] The prejudice to the Defendant would be substantial. This case will turn largely on the scientific evidence that relates to how the accident took place. The other facts are largely not in dispute. Ruling the Livernois report inadmissible while admitting the Sero report have serious implications for the Defendant's ability to defend the claim.

[38] The rebuttal expert report of Thomas Livernois has been properly filed and will be admitted in evidence.

[39] The costs of this motion will be \$500, payable in any event of the cause.

Campbell, J.